

CORDERO MINING CO.

IBLA 89-15

Decided December 4, 1991

Appeal from a decision of the Casper, Wyoming, District Office, Bureau of Land Management, to assess royalty on bypassed coal on coal lease W-8385.

Reversed.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

The Bureau of Land Management does not have the authority to require payment of royalties for coal which was bypassed and not mined in accordance with a resource recovery and protection plan, regardless of whether the decision to bypass violated the principle of maximum economic recovery or constituted waste of coal reserves.

APPEARANCES: Jerry R. Tystad, Manager of Engineering, Cordero Mining Company, Gillette, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Cordero Mining Company (Cordero) appeals from a decision of the Casper, Wyoming, District Office, Bureau of Land Management (BLM), dated August 11, 1988, to charge royalty on bypassed coal on coal lease W-8385. The bypassed tonnage surrounded the Boos Federal 3-26 oil well. BLM stated that to allow Cordero to bypass the coal without compensating the Government would violate the principle of maximum economic recovery (MER) as defined by 43 CFR 3480.0-5(a)(21).

The lease was originally issued to Cordero on March 1, 1971, for approximately 6,560 acres of land situated in Tps. 46 and 47 N., R. 71 W., sixth principal meridian, Campbell County, Wyoming. ^{1/}

^{1/} The original lease was issued to Cordero Mining Company of Palo Alto, California. Cordero assigned it to Sun Oil Company (Delaware) (Sun Oil). Accompanying the assignment papers were documents showing that Cordero Mining Company was liquidated into Sun Oil effective Dec. 31, 1972. Sun

A portion of this lease encompasses lands included within a Federal oil and gas lease issued prior to Cordero's coal lease. The area of concern in this appeal is the NE 1/4 NE 1/4 of sec. 26, T. 47 N., R. 71 W., sixth principal meridian, which is the site of the Boos Federal 3-26 well operated by Anderman/Smith Operating Company (Anderman/Smith). On August 30, 1985, Cordero entered into an agreement with Anderman/Smith setting forth procedures and responsible parties in the event a conflict arose between the two companies.

Anderman/Smith drilled the Boos Federal 3-26 well on Cordero's surface in May 1986 and began completion operations on June 19, 1986. After a breakdown the well was fractured. Over a period of 2 months (August and September 1986), 52 barrels of oil above load and 3,891 barrels of water were recovered. The well was temporarily abandoned on September 18, 1986, and all controllable surface equipment removed. See May 18, 1988, memorandum from the Casper District Manager to the Wyoming State Director.

By letter to BLM dated November 5, 1987, Cordero stated its belief that the well should be plugged and abandoned since it was a nonproducer and had been idle since about September 1986. Cordero explained that Anderman/Smith wanted to temporarily plug the well, allow Cordero to mind through, and then re-establish the surface casing, all at Cordero's labor and expense. Anderman/Smith proposed to use the well as an injector for secondary recovery in the area. However, Cordero noted that information provided by an Anderman/Smith partner showed that the well was fracture stimulated shortly after completion. According to Cordero, two of Anderman/Smith's partners and Sun Company's exploration and production unit indicated that a well is useless as a formation injector after a fracture treatment.

By letter dated November 30, 1987, BLM informed Cordero that based on its well analysis report of November 27, 1987, it recommended that the Boos Federal 3-26 well be permanently plugged and abandoned. BLM stated that Cordero and Anderman/Smith should negotiate an agreement on the terms and conditions of abandonment. BLM advised that, if the failure to reach an agreement resulted in lost Federal coal, Cordero would be charged royalty on the lost coal.

In a February 11, 1988, letter, BLM informed Cordero that Anderman/Smith had followed the required Federal regulations requesting that the

fn. 1 (continued).

Oil assigned it to Sunoco Energy Development Company (Sunoco). Sunoco assigned the lease to Sunedco Coal Company (Sunedco). By letter dated May 2, 1986, Sunedco advised BLM that during the pendency of the assignment from Sunoco to Sunedco, a corporate reorganization resulted in a name change for both the assignor and assignee corporations. Sunoco changed its name to Sunedco Coal Company and Sunedco Coal Company changed its name to Cordero Mining Company of Gillette, Wyoming. Presumably this Cordero Mining Company is not the same company as the original lessee.

Boos Federal 3-26 well remain temporarily abandoned for secondary recovery purposes. BLM advised Cordero that if it chose not to follow its August 30, 1985, agreement with Anderman/Smith and decided to mine around the well, Cordero would be in violation of its Resource Recovery and Protection Plan (R2P2). Again BLM reminded Cordero that if it mined around the well, the royalty on the lost coal would be charged to Cordero.

On February 19, 1988, Cordero wrote Anderman/Smith that it was considering alternatives for mining in the vicinity of the Boos Federal 3-26 well, which included mining around the well or mining through and re-establishing casing to the surface. Cordero stated that both options were an inconvenience to the mining operation and would generate additional operating costs. Due to this impact, Cordero proposed to offer Anderman/Smith \$30,000 to have the well plugged and permanently abandoned. Cordero added that Anderman/Smith would be absolved from any surface reclamation liability.

Anderman/Smith wrote to Cordero on March 3, 1988, stating that recent developments in the field further supported its belief that the Boos Federal 3-26 well was a valuable injection point for a future secondary recovery project. Anderman/Smith indicated that it had considered the possibility of selling the well bore to the mine and redrilling after the mining operation. However, Anderman/Smith explained that its actual cost on the well was \$ 315,010.70 and that it was unlikely that it could drill a replacement well today for the same cost. Anderman/Smith concluded that the difference in price was "just [too] large to close" and rejected Cordero's offer.

After considering all the alternatives, Cordero decided to mine around the Boos Federal 3-26 well and informed BLM of this decision in a letter dated March 24, 1988. Cordero stated that it was revising its current R2P2 submitted September 15, 1986, to reflect the short-term mine plan changes caused by the Anderman/Smith situation and enclosed information concerning the changes necessary to revise the R2P2. ^{2/} In a letter to BLM dated April 15, 1988, Cordero explained the options regarding the well and justified its decision to mine around the well.

In a memorandum to the State Director dated May 18, 1988, the Casper District Manager summarized the conflict between Cordero's mining operation

^{2/} By decision dated Sept. 14, 1988, the District Manager rejected the proposed R2P2 revision because Cordero's justification for the revision was deemed inadequate due to a lack of economic data necessary to process the revision. BLM's decision also included a notice of noncompliance issued to Cordero for not following the mining sequence established in its approved mine plan and advised that the noncompliance could be corrected by the submission of a monthly mining schedule showing progress toward following the approved mining sequence. BLM informed Cordero of its right to appeal the decision but also stated that if Cordero requested a meeting to review the notice, BLM would extend the time for filing a formal appeal. Cordero did not appeal the decision, and the record does not indicate whether Cordero sought such a meeting. Thus, the propriety of the Sept. 14, 1988, decision is not currently before us.

and Anderman/Smith's Boos Federal 3-26 well. The District Manager stated that the District recommended that Cordero not be charged the royalty on the unmined coal. He explained that Anderman/Smith had cost Cordero considerable time and expense trying to resolve the issue. He said that Cordero had tried diligently to find a way to mine the coal while avoiding unreasonable financial risk. He believed that the loss of royalty on the coal near the oil well was through no fault of Cordero's.

The State Director responded by a memorandum dated July 12, 1988, to the District Manager in which he stated that it would be a violation of the principle of MER as defined by 43 CFR 3480.0-5(a)(21) for Cordero to deliberately bypass approximately 100,000 tons of high-quality, low-ratio coal without compensation to the Government. The State Director set forth two options for the District Manager: (1) Actively assist the oil company and Cordero in finding grounds for a mutually acceptable mine-through agreement, or (2) allow Cordero to bypass the coal and pay royalty on the bypassed coal.

Subsequently, based on the State Director's review of the situation, the District Manager issued his decision on August 11, 1988, charging royalty on the bypassed coal. The District Manager explained that the regulations do not allow a coal company to be relieved of its obligation to achieve MER as defined by 43 CFR 3480.0-5(a)(21). He stated that Cordero was free to bypass the coal only if the royalty on the lost coal (\$ 0.20 per ton) was paid to the Government. The District Manager stated that BLM regretted that the August 30, 1985, agreement between Cordero and Anderman/Smith could not be followed. He concluded that since Cordero elected to bypass the coal, royalty would be charged on the bypassed tonnage. ^{3/}

In its statement of reasons, Cordero refers to the principle of MER and the regulatory definition found at 43 CFR 3480.0-5(a)(21):

(21) Maximum economic recovery (MER) means that, based on standard industry operating practices, all profitable portions of a leased Federal coal deposit must be mined. At the times of MER determinations, consideration will be given to: existing proven technology; commercially available and economically feasible equipment; coal quality, quantity, and marketability; safety, exploration, operating, processing, and transportation costs; and compliance with applicable laws and regulations. The requirement of MER does not restrict the authority of the authorized officer to ensure the conservation of the recoverable coal reserves and other resources and to prevent the wasting of coal.

^{3/} The District Manager explained that the volume would be calculated using Cordero's Quarterly Royalty Report submitted to the Casper District Office and that the calculated volume would then be verified with Cordero before submittal to MMS. He added that payment could be sent to MMS along with the regular quarterly royalty payment.

Cordero contends that the decision to bypass the well did not violate MER. Based on discussions with employees of Sun Exploration and Production Company and other Federal coal lessees in the Powder River Basin, Cordero determined that it was not "standard industry operating practice" to mine through and re-establish an oil well. Cordero states that it could find no evidence that there was "existing proven technology" to ensure the satisfactory return of the surface casing from the pit-floor or that such procedure had ever been tried.

Cordero asserts that it was faced both with a cost of \$20,000 to \$40,000 to attempt to bring the casing to the surface and with the concern that Anderman/Smith would not accept the restoration of an already questionable well. Cordero refers to a letter dated October 30, 1987, from Wintershall Corporation, one of the well owners, to Anderman/Smith in which Wintershall disputed Anderman/Smith's belief that, even though the well had been fracture treated, it could be used as a water injection well for another producing well. Wintershall suggested that the well be permanently plugged and abandoned. Cordero points out that nonacceptance by Anderman/Smith of well restoration following mining would result in litigation costs and the potential liability for drilling a new well costing in excess of \$300,000. According to Cordero, it reasonably determined that the coal surrounding the well was not a profitable portion of the leased Federal coal deposit.

Cordero notes that its reasons for not following the procedure in the August 30, 1985, agreement with Anderman/Smith to mine through the well were clearly articulated in the District Manager's memorandum of May 10, 1988, to the State Director. Cordero asserts that these reasons appear to have been arbitrarily rejected without explanation in BLM's decision of August 11, 1988, when BLM determined that to allow Cordero to bypass the well and surrounding coal without the payment of royalty would violate MER. Cordero asserts that BLM should not penalize Cordero without explanation after Cordero made a good faith determination that it was not profitable to mine through the well.

At the outset we note that 43 CFR 3482.2(a)(2), the regulation dealing with resource recovery and protection plans, provides that no plan or modification thereto shall be approved unless it is in conformance with the regulatory requirements and any Federal lease or license terms and/or conditions, and unless it is found to achieve MER of the Federal coal within a logical mining unit (LMU) or Federal lease issued or readjusted after August 4, 1976. Also, under the general performance standards for mining operations set forth at 43 CFR 3484.1(b)(1), the operator or lessee is required to conduct operations to achieve MER of the Federal coal upon approval of a resource recovery and protection plan for an LMU, or for a Federal lease issued or readjusted after August 4, 1976. The regulation provides that Federal leases issued prior to August 4, 1976, that have not been readjusted after August 4, 1976, shall comply with the Mineral Leasing Act regarding conservation of the recoverable coal reserves and other resources. Since the lease in question was issued in 1971 and there is no evidence in the file to indicate that the lease has been readjusted or been

included in an LMU as of the date of BLM's decision, it is not clearly documented in the record whether the principle of MER is applicable in this case. Other provisions of the regulations, however, require all lessees and operators to prevent wasting of coal reserves and other resources. See 43 CFR 3481.1(c) and 43 CFR 3484.1(b)(4).

[1] We need not decide whether Cordero's decision to bypass the coal associated with the oil well violates the principle of MER or constitutes wasting of coal reserves because, even if it does, BLM does not have the authority to require Cordero to pay royalty for the unmined coal. In Utah Power & Light Co., 118 IBLA 181, 98 I.D. 97 (1991), the Board addressed the issue of whether BLM could require Utah Power & Light (UP&L) to pay royalty now for coal that it failed to mine in accordance with its approved mine plan but which it proposed to mine in the future pursuant to the schedule established in its revised mine plan. The Board found that BLM had no authority "to impose a monetary penalty on UP&L for deviating from its mine plan, as may be done for violations of regulations by lessees on Indian lands. Cf. 25 CFR 211.22." 118 IBLA at 200, 98 I.D. at 107. The Board further held that, unless the lessee voluntarily agreed to pay the royalty, BLM lacked authority to collect royalty on unmined coal even if the failure to mine was a violation of the approved mine plan. 118 IBLA at 200-01, 202, 98 I.D. at 107-08, 109. Unlike in Utah Power & Light Co., supra at 200-01, Cordero has not volunteered to pay the royalty on the bypassed coal; thus, BLM has no authority to require Cordero to pay royalty on that unmined coal. 4/

Congress, in the Mineral Leasing Act, does not expressly provide for collecting royalty on coal that is left in the ground where the lessee is at fault in doing so. See 30 U.S.C. § 207(a) (1988). Nor has BLM promulgated regulations interpreting the Mineral Leasing Act as authorizing collection of royalty in such circumstances. 5/ Although collection of royalty where the lessee unjustifiably bypasses coal might be included in the lease as another "term" or "condition" under 30 U.S.C. § 207(a) (1988), appellant's lease does not so provide and expressly states, to the contrary, that royalty is due on or for "coal mined." Federal Coal Lease W-8385, Sec. 2(c).

Although BLM may not charge royalty for coal before it is mined, BLM can safeguard its interest in the unmined coal in other ways. The Board in Utah Power & Light, noted that BLM can protect the public's interest in the

4/ In that case, UP&L volunteered to pay royalty as a condition of the Government's approving UP&L's proposal to modify its mining plan to allow it to bypass the coal. Id. at 200-01.

5/ Congress did contemplate collection of royalty for unmined coal under other circumstances not present here. Under 30 U.S.C. § 207(b) (1988), 43 CFR 3483.4, and the lease terms, "advance royalties" may be collected, but only where "the condition of continued operation" of the mine is suspended. The condition of continued operation has not been suspended here, so "advance royalty" is not due. See Utah Power & Light Co., supra at 190, 98 I.D. at 102; Western Slope Carbon, Inc., 98 IBLA 198 (1987).

unmined coal resource by increasing the bond on the lease and by adding a stipulation to the lease when it is next readjusted to provide that royalty will be paid on unmined coal which could have been recovered. 118 IBLA at 203, 98 I.D. at 109; see also Coastal States Energy Co., 70 IBLA 386, 394 (1983). These options are available to BLM here as well.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the District Manager is reversed.

Gail M. Frazier
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

